in paragraph 6(a) of the statement of claim is arrived at also appears to have been done merely for the purpose of delaying the just claim of the plaintiff, having regard to the fact that this figure can easily be obtained by adding certain figures in the letter dated September 1, 1967 given by defendant itself. The figure of $1,186,466.86 mentioned in paragraph 6(b) of the statement of claim, being the credit balance in favour of the plaintiff as on May 31, 1967, is also admitted in that letter.

Thirdly, it should be noted that plaintiff filed its specially endorsed writ on September 30, 1971. At the request of the defendant, the plaintiff allowed the statement of defence to be filed by November 7, 1971. But the frivolous request for particulars as mentioned earlier on, was made on November 4, 1971, and, in order to avoid further delay, the plaintiff was obliged to accede to the defendant's request to file its defence one week after receipt of the particulars. The further particulars were filed in court on November 17, 1971, and the defendant filed its defence and counterclaim on November 23, 1971, but the curious thing is that a copy of the defence was not delivered to the plaintiff until December 4, 1971. In the light of this background, the admitted fact that negotiation between the defendant and the said Sharikat for the disposal of the 219 lots of land was commenced some time in October 1971, *i.e* after the filing of the writ, and the dilatory manner in which the defendant has responded to the plaintiff's claim, does indicate the intent to obstruct or delay as envisaged under section 19(1)(c) of the Debtors Ordinance.

Fourthly, it is apparent from paragraph 15 of the statement of defence that the defendant has sold 43 lots of land at a cheap price of $1.30 per square foot instead of the normal market price of $2.50. Selling the land *en bloc* at such a low price is an additional circumstance to be considered as to the intent of the defendant in trying to dispose of the subject-matter of the attachment in the present case, although that sale was a package deal involving both the lands in Gombak and Ampang.

Finally, in paragraph 8 of the defendant's first affidavit, it is deposed that the defendant is still the registered owner of six pieces of land valued at $1,587,248.46. If so, there is no reason to doubt the ability of the defendant to satisfy any judgment that might be made against it. However, apart from the fact that the alleged value of the property has not been verified, it is not in dispute that three of the properties have been charged to several banks and a finance company. Indeed, learned counsel for the defence admitted that not only three but all the six properties are in fact charged and, therefore, subject to encumbrances. Further, as deposed in paragraph 10 of plaintiff's second affidavit, the balance sheet of the defendant in respect of the year ended March 31, 1971 as filed with the Registrar of Companies discloses that the amount of liabilities and other provisions of the defendant as at that date amounted to $8,772,826.23 while its current assets comprising land and development expenditure at cost, shophouses at cost, trade and other debtors, and cash and bank balances amounted as at that date only to $8,583,739.47. In the event, the financial position of the defendant is not as rosy as it would like the court to believe.

Taking the above additional circumstance into consideration, and after considering their cumulative effect, I am more than satisfied, on the balance of probabilities, that the defendant has been deliberately delaying the substantive proceedings in order to give time to complete the sale of its lands. On the evidence before me, I am convinced that the defendant is disposing of its property *en bloc* to the said Sharikat with intent to obstruct or delay the execution of any judgment which the plaintiff may subsequently obtain in its favour. Under the circumstances, I have no alternative but to dismiss the application of the defendant to set aside the order for attachment before judgment dated December 3, 1971. I also order the costs of this application be costs in the cause.

Application dismissed.

Solicitors: *Chooi & Co.; Rithauddeen & Aziz.*

YEOH CHENG HAN v. OFFICIAL ADMINISTRATOR, MALAYA

[F.C. (Suffian, Gill & Ali F.JJ.) February 21, 1972]

[Penang — Federal Court Civil Appeal No. X. 109 of 1969]

Negligence — Road accident — Dismissal of claim by trial judge — No inherent improbability in the evidence of plaintiff.

Damages — Negligence — Loss of right arm — Assessment of damages.

In this case the trial judge had dismissed the claim of the plaintiff for damages in respect of personal injuries sustained by him as a result of an accident between a motor cycle driven by him and a motor scooter driven by one Lai Meng Hua, who died as a result of the accident. The plaintiff testified that the scooter was attempting to overtake a lorry and had gone to the wrong side of the road. The scooter suddenly swerved towards his left and he had therefore in an attempt to save himself swerved to the right to avoid the scooter. The impact took place on his side of the road.

Held, allowing the appeal: (1) in this case there was no inherent improbability in the evidence of the plaintiff and he was entitled to succeed;

(2) for the loss of his right arm the global sum of $27,500 was the correct sum to award in respect of pain and suffering, loss of amenities and loss of future earnings.

Cases referred to:-

(1) *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247.

(2) *James* v. *Woodall Duckham Construction Co. Ltd.* [1969] 2 All. E.R. 794.

(3) *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi* [1970] 2 M.L.J. 237.

FEDERAL COURT.

Triptipal Singh for the appellant.

S. D. K. Peddie for the respondent.

Cur. Adv. Vult.

Gill F.J.: This is an appeal by the plaintiff in the action from the judgment of Wan Suleiman J. dismissing his claim for damages in respect of personal injuries sustained by him as a result of an accident

between a motor cycle driven by him with one Kuan Ah Ngah as his pillion rider and a motor scooter driven by one Lai Meng Hua alias Lai Min Hua. The said Lai Meng Hua having died as a result of the accident, the action was brought against the defendant as the administrator of his estate.

The accident took place at the 41st milestone Alor Star/Butterworth road on 1st April, 1962 at about 8 a.m. when the plaintiff's motor cycle was going uphill on an S-shaped bend and the scooter was coming from the opposite direction. The plaintiff's evidence was that, as he was travelling at about 30 m.p.h. on his proper side of the road about two feet from the edge of the road, he first saw the motor scooter coming at a high speed at a distance of 30 to 40 feet from him. It had gone about 2 feet across the white line dividing the road on to his half of the road and was attempting to overtake a lorry which was travelling on its proper side of the road. Before it could overtake the lorry, and after the lorry had passed him. it collided with his motor cycle. The collision took place when the scooter swerved towards his left and he had swerved slightly to the right in order to avoid the motor scooter which was encroaching more and more to his path. The impact took place on his side of the road from the central white line. After the collision he lost consciousness which he regained at Sungei Patani Hospital.

The plaintiff was cross-examined at length by counsel for the defendant, Mr. Mooney. Under cross-examination the plaintiff said that when he first saw the lorry it was about 15 to 25 feet away, indicating the distance in court by pointing to a chair which was about 15 feet away. He then said that he saw the lorry before that, when it was 20 feet away, again indicating the distance by pointing to a spot about 20 feet away from him. He agreed that visibility was good and maintained that he was paying attention to where he was going, his explanation for not seeing the lorry earlier being that there was a rise and a bend at that spot. He next said that when he first saw the lorry it was 80 feet away, but indicated the distance by pointing to a spot from the witness box which was 40 feet away. He said he guessed the distance. He went on to say that the lorry was about the same distance as the distance from the witness box to the road outside the court house, a distance of about 50 feet. He concluded by saying that he made a mistake when he said earlier that the lorry was 20 feet away when he first saw it, his explanation for the mistake being that as the incident took place so long ago he could not remember things in detail, although he could remember some of the things which happened.

At that stage of the cross-examination Mr. Mooney referred the plaintiff to the sketch plan of the scene of the accident which formed part of the agreed bundle of documents. In answer to questions put to him with regard to the sketch plan the plaintiff said:

"*A* on A.B. 5 in ink was the point of collision and *B* the place where lorry was. The spots I have marked are a guess, but I think they are the correct spots. I maintain that these are the correct positions."

When cross-examined further, he said that he swerved to the right to avoid an accident, because if he had swerved to the left he would have collided with the scooter which was encroaching on to his path. He claimed that the only way to avoid the scooter was to swerve to his right because the scooter was still going towards his left. He couldn't remember the distance between the scooter and the near-side of the road when he swerved to the right, but he would say that it was about 3 feet. He did not collide with the lorry because he remained on his side of the road and the lorry remained on its side of the white line. The collision took place almost immediately after he swerved to the right.

Kuan Ah Ngah (P.W.3), the pillion rider, gave evidence which was somewhat similar to that of the plaintiff. Under cross-examination he said that the collision took place immediately after the on-coming lorry had passed. He said he did not know if the motor scooter was trying to overtake the lorry. He then said that it was trying to overtake the lorry. He remembered giving evidence in the magistrate's court in connection with the same accident but couldn't say whether he said anything in that court about the motor scooter overtaking the lorry. On further cross-examination he went on to say:

"I now remember I said nothing about it trying to overtake a lorry. I did not tell court about the lorry because I was confused. I now say that I forgot to tell the court. I forgot to tell court about the other motor cyclist being about to overtake lorry. It did not strike me as being important — but now it strikes me as being important. I did not realise its importance until I went into witness box. I had never discussed the evidence with plaintiff — never at any time. I have never asked him what he remembered about accident and he has never asked me about accident."

In re-examination he said he couldn't remember who asked him questions in the magistrate's court. He was asked questions and he answered them. In answer to a question put to him by the court he said that the collision took place a short while after the lorry had passed them.

The rest of the evidence for the plaintiff was the agreed bundle of documents, which included, *inter alia*, the medical reports on the plaintiff of Dr. I. A. Muthu and consultant surgeon C. K. Young, the reports of the vehicle examiner on the damage to the two motor vehicles and some photographs taken at the scene of the accident. A certified copy of the notes of evidence in Sungei Patani Magistrate's Court Arrest Case No. 204/62 relating to a criminal prosecution of the plaintiff was put in as Exhibit P1.

The only eye-witness for the defence having died in the accident, Mr. Mooney was in the unfortunate position of being unable to call any evidence. The only course open to him, therefore, was to show that on the evidence adduced the plaintiff had failed to make out a case of negligence on the part of the deceased. Having dealt with quantum of damages, he proceeded to make his submissions on the question of liability, in the course of which he put forward the following arguments. Point I on the sketch plan, where pieces of glass were found, and point X on the same plan, where there was a blood stain, indicated the places of collision, and they were both on the defendant's side of the road. The conclusion to be drawn from photograph A in the agreed bundle was

that the plaintiff had crashed on to the scooter. The reports of the vehicle examiner showed that whereas the plaintiff's motor vehicle was unroadworthy in that its tyres were bald, the two tyres of the scooter were new. The question as to how the vehicles got to the other side of the road remained unanswered. The plaintiff's evidence as to why he did not swerve to the left was unreliable, and so was the evidence of the pillion rider (P.W.3). The delay on the part of the plaintiff in bringing the action was indicative of the uncertainty of his own case. The essence of his submissions was his argument, on the authority of *Hornal* v. *Neuberger Products Ltd.*,[1] that the plaintiff had to prove his case on the balance of probability, which he had failed to do.

Mr. Triptipal Singh, on behalf of the plaintiff, had very little to say in reply to Mr. Mooney, and quite naturally he relied entirely on the evidence adduced on behalf of the plaintiff. As regards the delay in the filing of the action he said that the plaintiff went to see Mr. Young only after his re-admission to the hospital, and that it took time for the official administrator to be appointed as the administrator of the deceased's estate.

In the event, the learned trial judge dismissed the plaintiff's action. With regard to the evidence of the plaintiff the learned judge states in his grounds of judgment:

'He changed his mind twice after that, indicating a spot about 40 yards away, and eventually another about 50 yards away as the distance from which he had first noticed this lorry. As a reason for this vacillation, he admitted inability to remember some details because of lapse of time."

With respect to the learned judge, at no time did the plaintiff mention any distance of 40 yards or 50 yards, so that if there is a typing error about the distances in question, as is more likely in view of what the plaintiff actually said, nothing very much can turn on the discrepancies in relation to the distances mentioned by the plaintiff. This is particularly so when it is borne in mind that at one stage the plaintiff mentioned a distance of 80 feet but demonstrated it by pointing to a spot which was only 40 feet from the witness box. In my judgment, it is extremely difficult to rely too much on the estimates of distances by witnesses after a long lapse of time.

The learned judge goes on to say in his grounds of judgment:

"From the sketch plan at A.B. page 5 it should be noted that both vehicles (B and C therein) came to rest on plaintiff's off-hand side of the road. To me this suggests at least two possibilities — The first possibility is that it was the plaintiff's motor cycle which had gone across the road and hit the deceased's vehicle. The other is that the greater momentum generated by plaintiff's machine which would indicate greater speed had thrown both machines across, the collision having been near the central line. However broken pieces of lamp glass at 'I' were also on the verge of that side of the road though if, as plaintiff maintained the collision had occurred at the central white line, the probabilities are that glass would be there instead."

It is to be observed that there was no evidence that the plaintiff went to the wrong side and knocked into the deceased. It was never put to him in cross-examination that he had done so. It is true that both vehicles were found on the wrong side but, as has been said in these courts again and again, the position of the vehicles after the accident can afford absolutely no proof as to their respective positions on the road immediately before or at the moment of collision, unless there is the clearest evidence to show that the vehicles involved in the accident stopped dead upon impact; and there was no evidence to that effect in the present case. As to the broken pieces of lamp glass, there was no evidence to show whether the lamp was shattered on impact or after the vehicle had fallen.

The learned judge felt that as the pillion rider Kuan (P.W.3) had changed his story under cross-examination as regards the deceased's vehicle trying to overtake the lorry just before the collision, he had shown himself to be a most unreliable witness. Kuan had said nothing in the magistrate's court about the scooter trying to overtake the lorry, although he did say that there was a collision soon after a motor lorry passed them from the opposite direction, his explanation being that he merely answered the questions put to him in that court. Can it be said in those circumstances that his credit had been impeached? I do not think so. In my judgment there is a lot of difference between a witness saying something in the lower court and saying directly the opposite in the higher court, and saying nothing in the lower court about something which he says in the higher court. This is especially so when he tendered the explanation that he was asked no questions on the point in the lower court. However, I agree that the learned judge was entitled to regard Kuan's evidence with suspicion. Indeed, counsel for the appellant before us conceded that he was not too happy with Kuan's evidence. I will therefore proceed on the basis that not too much reliance can be placed on that part of his evidence. But I would hasten to add that the rest of his evidence, which tended to corroborate at least a part of the plaintiff's story, was not seriously challenged.

In the concluding paragraph of his grounds of judgment the learned judge says:

"Even if there had been a lorry preceding the deceased's scooter, it seems to me to be more probable that the plaintiff from excessive speed or general inattentiveness lost control of a vehicle with extremely bad tyres, whilst negotiating the bend and that the collision had been entirely due to his own negligence."

I regret to say, with respect to the learned judge, that in saying that he was speculating on what might have happened, so that the conclusion at which he arrived was a matter of pure conjecture. It was never put to the plaintiff that he had lost control because of the extremely bad tyres of his motor cycle. I am therefore constrained to say that the learned judge's finding cannot be supported by evidence and is indeed against the weight of evidence.

Assuming that the learned judge was right in rejecting the evidence of Kuan (P.W.3) altogether, he still had to consider the evidence of the plaintiff. In dealing with that evidence he had to consider whether it was inherently improbable. There is nothing in his grounds of judgment to suggest that he considered it to be so. Apart from the alleged discrepancies in the distances mentioned by the plaintiff, there was

very little criticism of his evidence. His was the only version before the court as to how the accident took place, and that version was in no way inconsistent with the damage to the two vehicles and the position at which they were found after the impact. In the absence of anything to show that there are inherent improbabilities about the plaintiff's evidence, I do not see how it can be said that he had not proved his case on the balance of probabilities.

Counsel for the respondent submitted before us that the trial judge's finding is right but that his reasons for that finding are wrong. His main argument is that if the scooter kept on moving more and more to its right, as alleged by the plaintiff, the accident could not have taken place in the centre of the road. In other words, according to him, there is an inherent improbability in the plaintiff's story. The fallacy in that argument lies in the fact that there is no evidence that the accident took place in the centre of the road. In marking the spot on the plan at which the impact took place the plaintiff was indicating the approximate position, his evidence being that the impact took place on his side of the road, and he gave no evidence as to the extent of the encroachment of his path as the scooter kept on moving more and more to its right. There was certainly no evidence of the scooter suddenly darting out on to the path of the plaintiff. Moreover, the plaintiff testified that the scooter suddenly swerved towards its left. It was only when he was about three feet from the scooter that, in the agony of the moment in an attempt to save himself from the peril in which he was placed by the wrong action of the deceased, he swerved to the right in an endeavour to avoid the scooter, so that he cannot be said to have been guilty even of contributory negligence.

For the reasons I have stated there was no inherent improbability in the evidence of the plaintiff, so that he was entitled to succeed, and I would hold accordingly.

Coming to the question of damages, it is a matter for regret that the learned judge did not proceed to assess them on the assumption that the matter might go up to a higher court. As has been said in some cases before, it is very desirable for a trial judge to do so even if he comes to a finding that the action must fail. In the circumstances of the present case it falls on us to assess the damages, as both counsel have raised no objection to our doing so.

The injuries suffered by the plaintiff as a result of the accident are set out in his statement of claim and the report of Dr. I. A. Muthu. The plaintiff was discharged from the hospital on 13th May, 1962. He was again in hospital for 9 days from 25th April, 1965 for an operation on his right upper chest. On 18th November, 1965 he was examined by Mr. C. K. Young, Consultant Surgeon, General Hospital, Penang. The results of Mr. Young's examination are contained in his report of 22nd November, 1965 which is in the agreed bundle. In his evidence in court Mr. C. K. Young (P.W.1) said that the right arm of the plaintiff had lost all its functions, including the ability of holding anything in the right hand.

Before the accident the plaintiff was a coffin maker. His average monthly earnings, which were not seriously challenged by the defence, amounted to $240. On the basis of his loss of such earnings from the date of the accident to the date of the filing of the action (1st February, 1968), a period of 70 months, his counsel submitted that he should be allowed a sum of $16,800 by way of special damages. Counsel for the respondent, relying on the authority of *James* v. *Woodall Duckham Construction Co., Ltd.*[2] submitted that special damages by way of loss of earnings should not be allowed for the whole of the period as the plaintiff could have filed and brought his action to trial much earlier. In this connection it is to be observed that the plaintiff was re-admitted into hospital in November, 1965. He was examined by Mr. C. K. Young in the same month and a report on his condition was issued soon afterwards. Assuming that it took time for the official administrator to be appointed, there is no reason why a writ could not have been issued long before the 1st of February, 1968. On the other hand, special damages in respect of loss of earnings are normally allowed up to the date of the trial of the action. In all the circumstances of the case, I would award $10,000 as special damages. As regards general damages, to all intents and purposes the plaintiff has lost his right arm. Therefore, as in the case of *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi*,[3] I would award a global sum of $27,500 in respect of pain and suffering, loss of amenities and loss of future earnings. In the result I would allow the appeal, set aside the judgment of the learned trial judge and substitute therefor judgment for the plaintiff in the sum of $37,500 with costs to the appellant here and in the court below.

Suffian and **Ali F.JJ.** concurred.

Appeal allowed.

Solicitors: *Triptipal Singh & Co.*: *Skrine & Co.*

MALAYSIAN AUSTRALIAN FINANCE CO. LTD. v. THE LAW UNION & ROCK INSURANCE CO. LTD.

[O.C.J. (Mohamed Azmi J.) March 13, 1972]

[Kuala Lumpur — Originating Summons No. 349 of 1971]

Insurance — Motor insurance — Coverage — Policy taken out in accordance with terms of hire-purchase agreement — Endorsement on policy acknowledging finance company as owner of subject-matter — Whether finance company had co-extensive rights as insured in instituting claims.

Practice and Procedure — Declaration — Determination of rights — R.S.C. 1957, O. 54A.

This was an application under R.S.C., 1957, O. 54A, for the determination of two questions arising under a commercial vehicle policy of insurance dated June 29, 1968, issued by the respondent to one Choong Kok Hing, the insured.

At the commencement of the trial, however, it was agreed that there was only one question to be determined by the court, namely, whether the applicant had rights co-extensive as the said insured, Choong Kok Hing, in instituting claims in its own name against the respondent arising out of loss of the subject matter upon which coverage was